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Nos. 96-552 and 553

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

– No. 96-552 –

RACHEL AGOSTINI, ET AL.,

Petitioners,

vs.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

(For Continuation of Caption, See Reverse Side of Cover)

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF FOR PETITIONERS CHANCELLOR AND BOARD OF EDUCATION OF THE CITY OF NEW YORK

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– No. 96-553 –

CHANCELLOR OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, ET ANO.,

Petitioners.

vs.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

QUESTIONS PRESENTED

1. Whether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief petitioners seek?

2. Whether the Court should overrule its holding in *Aguilar v. Felton*, 473 U.S. 402 (1985) that municipal petitioners may not, consistent with the Establishment Clause of the First Amendment, provide federally-funded remedial and educational services through petitioners' professional employees to eligible students on the site of parochial schools which such students attend?

PARTIES TO THE PROCEEDING

Petitioners under docket 96-553 are the Chancellor of the Board of Education of the City of New York and the Board of Education of the City School District of the City of New York. They were defendants-appellants in the Court of Appeals.

Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnation, Maria L. Fernandez, Dolly Cutrera Then and Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson, Cheryl Malcousu, Tonya Stevens, and Rosemarie Vasquez, petitioners under docket 96-552, were intervenors-defendants-appellants in the Court of Appeals.

The Secretary of Education is a respondent under both dockets 96-552 and 96-553 and was a defendant-appellee in the Court of Appeals.

Betty Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side and Allen H. Zelon are respondents under both dockets and were plaintiffs-cross-appellants in the Court of Appeals.

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– No. 96-553 –

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS CHANCELLOR AND BOARD OF EDUCATION OF THE CITY OF NEW YORK

OPINIONS BELOW

The order of the Court of Appeals, which under its rules will not be reported in the Federal Reporter, is reprinted in the Appendix to the Petition under docket 96-553 at A2-5. The decision of the United States District Court for the Eastern

District of New York, which is unreported, is contained in the Appendix to the Petition at A6-21. This Court's prior opinion in this case, *Aguilar v. Felton*, is reported at 473 U.S. 402.

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 1996. A timely petition for a writ of certiorari was filed by petitioners Chancellor and Board of Education on October 4, 1996 and docketed under docket no. 96-553. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C., § 1254(a). On January 17, 1997, the Court granted the petition, and ordered it consolidated with the case under docket no. 96-552, *Rachel Agostini, et al. v. Betty Louise Felton, et al.*

CONSTITUTIONAL STATUTORY, AND REGULATORY PROVISIONS

First Amendment, United States Constitution

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Relevant Provisions of Title I of the Improving American Schools Act of 1994

20 U.S.C. § 6321, Participation of children enrolled in Private Schools

(a) General Requirement

(1) In general

To the extent consistent with the number of eligible children identified under section 6315(b) of this title in a local educational agency who are enrolled in private elementary and secondary schools, a local educational agency shall, after timely and meaningful consultation with appropriate private school officials, provide such children, on an equitable basis,

special educational services or other benefits under this part (such as dual enrollment, educational radio and television, computer equipment and materials, other technology, and mobile educational services and equipment).

(2) Secular, Neutral, Nonideological

Such educational services or other benefits, including materials and equipment, shall be secular, neutral, and nonideological.

(3) Equity

Educational services and other benefits for such private school children shall be equitable in comparison to services and other benefits for public school children participating under this part.

(4) Expenditures

Expenditures for educational services and other benefits to eligible private school children shall be equal to the proportion of funds allocated to participating school attendance areas based on the number of children from low-income families who attend private schools.

(5) Provision of services

The local educational agency may provide such services directly or through contracts with public and private agencies, organizations, and institutions.

(b) Consultation

(1) In General

To ensure timely and meaningful consultation, a local educational agency shall consult with appropriate private school officials during the design and development of such agency's programs under this part, on issues such as --

(A) how the children's needs will be identified;

(B) What services will be offered;

(C) How and where the services will be provided;

(D) how the services will be assessed; and

(E) the size and scope of the equitable services to be provided to the eligible private school children, and what is the proportion of funds allocated under subsection (a)(4) of this section for such services.

* * *

(c) Public control of funds

(1) In general

The control of funds provided under this part, and title to materials, equipment, and property purchased with such funds, shall be in a public agency, and a public agency shall administer such funds and property.

* * *

20 U.S.C., § 6322 Fiscal Requirements

* * *

(b) Federal funds to supplement, not supplant, non-Federal funds

(1) In general

(A) Except as provided in subparagraph (B), a State or local educational agency shall use funds received under this part only to supplement the amount of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds.

(B) For the purpose of complying with subparagraph (A), a State or local educational agency may

exclude supplemental State and local funds expended, in any eligible school attendance area or school for programs that meet the requirements of section 6314 or 6315 of this title.

* * *

Regulations of the Secretary of Education

34 C.F.R.:

§ 200.12 Requirements to ensure that funds do not benefit a private school.

(a) An LEA shall use funds under this subpart to provide services that supplement, and in no case supplant, the level of services that would, in the absence of Title I services, be available to participating children in private schools.

(b) An LEA shall use funds under this subpart to meet the special educational needs of participating private school children, but not for --

(1) The needs of the private school; or

(2) The general needs of children in the private school.

§ 200.27 Reservation of funds by an LEA.

Before allocating funds in accordance with § 200.28, an LEA shall reserve funds as are reasonable and necessary to -

* * *

(c) Administer programs for public and private school children under this part, including special capital expenses not paid for from funds provided under § 200.16 that are incurred as a result of implementing alternative delivery systems to comply with the requirements of *Aguilar v. Felton;*

* * *

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief and subject matter jurisdiction is invoked under 28 USC § 1331 because the action arises under the United States Constitution and federal law. In *Aguilar v. Felton*, 473 U.S. 402 (1985), this Court, by a 5-4 majority, held the Board's method of providing federal Title I services to needy students who attend parochial schools violated the Establishment Clause because Board of Education teachers and other professionals provided their remedial and related educational services on the premises of parochial schools. The program involved in that decision, originally enacted as Title I of the Elementary and Secondary Education Act of 1965, and later superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981, authorized the Secretary of Education to distribute financial assistance, through the states, to local educational institutions to meet the needs of educationally deprived children from low-income families.

Pursuant to Title I, federal funds are provided for remedial, supplementary education and support services for elementary and secondary school students. JA 309.[1] Although the statutory scheme considered in *Aguilar* has been superseded by subsequent legislation, most recently by Title I[2] of the Improving America's Schools Act of 1994, codified at 20 U.S.C. § 6301 *et seq*, the provisions relating to private school students have remained essentially unchanged. Title I benefits are available to all eligible students, within fiscal limitations, including those who attend parochial schools. 20 U.S.C. § 6321. Title I funds can be used only to supplement, not to

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[1] Numerical references preceded by the designation "JA" are to the Joint Appendix. References preceded by "A" are to the Appendix to the Petition under docket 96-553 submitted by the petitioners Chancellor and Board of Education.

[2] For purposes of clarity, all references to the statutory schemes in effect at various times will be by the term "Title I."

supplant, the public or private school student's regular classroom work. *See* 20 U.S.C. § 6322(b). Title I services provided to private school students must be "equitable" in comparison to services provided to participating public school students. 20 U.S.C. § 6321(a)(3), (d); 34 CFR 200.10-11 (1996). All services and materials provided with Title I funding must be secular, neutral and nonideological, and the control of all funds and title to all equipment provided under Title I must be in a public agency. 20 U.S.C. § 6321(a)(2) & (c)(1).

The pre-Aguilar program

Beginning in 1966, New York City's Board of Education provided Title I services on premises to students at private schools, during the school day. JA 64-65. This was done only after attempts to provide the services by alternative means, including providing the services after the school day, proved unsuccessful. JA 312. Under the original 1965 program, the Board attempted to provide services to private school students by requiring them to travel to public schools after regular school hours to receive remedial services from Board employees. JA 63. Attendance was poor, and later in the 1965-66 school year the Board transferred some Title I services to private schools after school hours. JA 63. However, attendance remained poor. Under both approaches, teachers were tired, students inattentive, parents expressed concern about the safety of their children, and there was little communication between Title I professionals and the classroom teachers. JA 63-64.

Accordingly, in August 1966, the Board adopted a program for providing remedial services to disadvantaged children on private school premises during the school day. The services would be provided by teachers in the public school system who would go from one school to another during the school day, and none of the work would duplicate any of the regular classroom work of the schools involved. Certain proposed programs, like speech improvement and library services, were rejected as being too close to regular classroom work or

providing services to the private schools rather than the children. JA 64-66.

Under its on-site program, the Board provided a number of remedial services to students at private schools: remedial reading, remedial mathematics, English as a second language, and clinical and guidance services. JA 45-46. Private schools with children receiving Title I instructional services typically set aside a classroom for exclusive use by Title I teachers. None of the private school facilities used for Title I programs contained any religious symbols or artifacts. JA 58-59. The teachers assigned to the private school Title I program were regular salaried employees of the Board of Education. JA 46. Determination of which private schools a teacher or other professional would serve in was made by the Board's Bureau of Nonpublic School Reimbursable Services; private school officials had no voice in the assignment of a Title I teacher. JA 48. Religion was not a factor in Title I assignment. JA 48. The amount of time a Title I teacher would spend at any particular private school was determined solely by the number and needs of the students eligible for Title I assistance; e.g., in the 1981-82 school year, 78% of teachers worked in more than one private school, with children in 180 of 231 private schools receiving services from itinerant teachers. JA 49.

Prior to assignment, the Title I professionals were given guidelines which emphasized that they were accountable only to their Title I supervisors, and not to any private school official. JA 50. They were instructed not to engage in team-teaching or other cooperative instructional activities with private school teachers, although they might engage in purely professional consultations with private school teachers concerning the students' needs and progress. JA 50-51. The teachers were directed not to introduce any religious matter into their teaching, and to refrain from any involvement in religious activities of the school. JA 51. The Title I professionals were supervised by field supervisors employed by the New York City Board of Education who were expected to make at least one unannounced visit each month to review the performance of the Title I professional. JA 52-53. Other

supervisors provided monthly in-service training sessions, frequently on days when private schools were otherwise closed for religious holidays. JA 54. A large majority of the Title I teachers worked in private schools which had religious affiliations different from their own, and there had never been a recorded complaint by a Title I teacher of interference by private school authorities, or a report by a supervisor that teachers had engaged in religious activities. JA 49-50, 52.

Teaching materials and equipment used in the Title I program were selected by Board employees, and did not duplicate materials used in regular classroom instruction or contain any religious content; all equipment and material was labeled as Board property, locked in storage when not used, and was subject to annual inventory. JA 55-57. While there were necessarily routine administrative contacts between the Board of Education and the private school officials, they consisted of three general categories of communication: 1) information about Title I; 2) processing requests for services by the schools; and 3) resolving scheduling problems and other questions concerning implementation of the Title I program. JA 59-63.

The Board's on-site program was highly successful, and participating students showed measurable improvement in overcoming their learning disabilities. JA 68-70. Indeed, Judge Friendly, in writing for the Second Circuit in *Felton v. Secretary, United States Department of Educ.*, 739 F.2d 48, 49 (1984), *affd. sub nom. Aguilar v. Felton*, 473 U.S. 402 (1985), stated that "the City could reasonably have regarded [the on-site program] as the most effective way to carry out the purposes of [Title I]." The Board's program was not atypical; prior to this Court's ruling in 1985 invalidating the Board's program, in New York State and across the nation Title I services to children attending religious-affiliated schools were largely provided inside the schools by publicly employed professionals. JA 309, JA 352-354.

Litigation and the Court's ruling in Aguilar v. Felton

In *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F.Supp. 1248 (S.D.N.Y.), *app. dsmsd. sub nom National Coalition for Public Ed. v. Hofstedler*, 449 U.S. 805, *reh. den.*, 449 U.S. 1028 (1980) (hereinafter, "Pearl"), an action to enjoin the allocation and use of Title I funds for the Board's on-site program, a three judge court, after an evidentiary hearing, made detailed findings as to the nature of the Board's program, and found the Board's program to be constitutional under the three-pronged test adopted by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In dealing with the issue of excessive entanglement, the court specifically found that the Board's employees scrupulously followed the Board's guidelines and considered their role as independent of the private school's instructional program, and that the Board's supervisory personnel had only casual contact with private school administration and little or no contact with private school teachers. Id., pp. 1267-68.

The subject action was commenced in the Eastern District of New York, while *Pearl* was pending. Upon final disposition of *Pearl*, the parties moved and cross-moved for summary judgment as to whether the Board's plan complied with the Establishment Clause, and the parties stipulated that the record of *Pearl* would be part of the record in this action. JA 287-288. The District Court, in a memorandum order dated October 4, 1983, adopted the opinion of the three-judge court in *Pearl* and granted summary judgment to defendants. JA 287-289. The District Court specifically noted that the record demonstrated that the Board's Title I program had resulted in no unconstitutional mixing of government and religion. JA 288-289.

On plaintiffs' appeal, the Court of Appeals reversed and granted summary judgment to plaintiffs. *Felton v. Secretary of Educ.*, *supra*, 739 F.2d 48. While the Court recognized the effectiveness of the Board's Title I program, that the Board had been successful in keeping its professionals from giving sectarian instruction, and that any off-site program would be

either more costly or less effective, the Court found that the Board's program violated the Establishment Clause as constituting an excessive entanglement of Church and State. *Id.*, p. 49-50, 69-72.

This Court, treating the defendants' appeal as a petition for certiorari, granted the petition and, by a 5-4 decision, affirmed the Second Circuit's grant of summary judgment to plaintiffs. *See Aguilar v. Felton*, 473 U.S. 402 (1985). The Court reasoned that the presence of Board employees in religious schools "require[d] a permanent and pervasive state presence" in religious institutions. *Id.* at 413. The Court premised its finding of unconstitutionality solely on the ground of excessive entanglement, although in the companion case of *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) the Court invalidated state programs on the ground of impermissible religious effect without explicitly deciding the entanglement issue. *Id.* p. 397, n.14. In *Aguilar*, the Court found an excessive entanglement in the very supervisory system adopted by the Board to prevent the inculcation of religious beliefs, as well as in the cooperative efforts between the Board's administrative personnel and teachers and their private school counterparts. 473 U.S. at 409, 412-14.

The majority opinion in *Aguilar* prompted several dissenting opinions. Former Chief Justice Burger remarked that "today's decision will deny countless schoolchildren desperately needed remedial teaching services." *Aguilar*, 473 U.S. at 419, (Burger, C.J. dissenting). He further noted that "[w]hat is disconcerting about the result reached today is that, in the face of the human cost entailed by this decision, the Court does not even attempt to identify any threat to religious liberty posed by the operation of Title I." *Id.* Likewise, then-Justice Rehnquist opined that "[t]he Court today strikes down nondiscriminatory nonsectarian aid to educationally deprived children from low-income families. The Establishment Clause does not prohibit such sorely needed assistance . . . ." *Id.* at 421 (Rehnquist, J. dissenting).

In her dissent, Justice O'Connor extensively reviewed the Board's Title I program, and found that "[t]he abstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York City." *Aguilar*, 473 U.S. at 424, (O'Connor, J. dissenting). She then concluded that

> the Court's decision is tragic. The Court deprives [New York City schoolchildren] of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers (most of whom are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory and the analysis . . . on which it is based. I cannot close my eyes to the fact that, over almost two decades, New York City's public school teachers have helped thousands of impoverished parochial schoolchildren to overcome educational disadvantages without once attempting to inculcate religion. Their praiseworthy efforts have not eroded and do not threaten the religious liberty assured by the Establishment Clause.

Id. at 431.

The Board's post-Aguilar Title I program

On remand, the District Court entered a judgment, dated September 26, 1985, which included an injunction enjoining the Secretary of Education and the Chancellor of the Board of Education from using public funds for a Title I program to the extent it requires or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools. A 22-26. The judgment, entered on the Court's decision in *Aguilar*, provided for a stay of its effect until the start of the September 1986 school year to provide the Chancellor with an opportunity to comply with its requirements. A 26. The judgment was affirmed by the Court of Appeals. *Felton v. Secretary, United States*

Department of Educ., 787 F.2d 35 (2nd Cir., 1986). Since 1986, the Chancellor and the Board have sought to provide the Title I services through alternative means, which have proven to be both less effective and more expensive than the on-site program which existed for almost 20 years prior to *Aguilar*.

The Board has used four alternative methods of providing Title I services to private school children, which in the 1984-85 school year had included approximately 22,000 students, the great majority being parochial school students. JA 313, JA 314-315. After *Aguilar* there was a drop-off in private school participation, but by 1993-94, the number again approached 22,000, out of a total New York City Title I population served, in both public and private schools, of approximately 260,000. JA 310, JA 334.

The alternatives are public school sites, leased sites, Mobile Instruction Units ("MIU's"), and Computer Assisted Instruction ("CAI"). Because of severe overcrowding at the Board's public schools as a result of a growing public school population, as well as problems caused by travel between the private and public schools, the use of public school sites has decreased so that while in 1985/86 approximately 3500 private school students obtained Title I services at public school sites, by the 1993-94 school year, approximately 1200 students received services at public school sites. JA 316-318. Furthermore, the expected drop in private school participation in the Title I program after *Aguilar*, was at least partly attributable to dissatisfaction with the public school sites. JA 317-318, JA 711-712. The leased sites have been a limited resource for Title I services due to the unavailability of appropriate sites. JA 323-325 . In 1993-94, approximately 1600 private school students received their Title I services on leased sites. JA 325. Private school students who receive their services at public school sites and leased sites often spend considerable time travelling between their regular school and the public school or leased site; this loss of instructional time is particularly unfortunate for Title 1 students, who by definition are in need of instruction. JA 329-330.

The remaining two alternatives, which the Chancellor has been forced to use, are Mobile Instruction Units and Computer Assisted Instruction. Both are unsatisfactory. An MIU is really an expensive bus turned into a classroom, JA 465-467, while CAI is a depersonalized, electronic teacher. In 1986-87, approximately 3500 private school students were receiving their Title I services in MIU's; by 1993-94, approximately 11,600 students, or more than half of the private school students receiving Title I assistance in New York City, received them in MIU's. JA 310, JA 323.

The MIUs are very expensive. The Board leases MIUs from a private company, at an annual cost in excess of $100,000 per vehicle. JA 338. The total cost for leasing MIUs through the first 8 years of the post-*Aguilar* program was $83,729,440. JA 336, JA 345. In 1994-95, the Board leased 126 MIU's. JA 322-323. The contract requires the MIU supplier to provide garage, maintenance, repair, cleaning, and insurance for the MIU. JA 321. The supplier must also provide a driver who remains at the MIU during the school day to provide security. JA 321.

In order to maximize the efficient use of MIUs, each vehicle contains a folding partition. When the partition is closed, one section of the MIU can accommodate a class of up to 10 students, which is the maximum class size with one teacher permitted under the New York State Education Department ("SED") Guidelines. The smaller section can be used for activities such as counseling, "English as a Second Language" classes, parent-teacher conferences, or staff conferences. JA 320.

MIUs lack many of the amenities which are accessible in the traditional school environment. First, MIUs lack telephone services. Each vehicle is equipped with a walkie-talkie, which is used in case of an emergency. Second, MIUs lack bathroom facilities. Third, due to safety considerations, windows in the MIU classroom area are small and covered with a heavy wire grid. Fourth, there is limited storage space for equipment and

supplies. Fifth, MIUs lack an external source of electrical power. JA 321-322.

During school hours, the MIU is parked on a public street near the private school. MIUs are not permitted to be parked on private school property. Instead, they are generally parked on the same block as or around the corner from the private school. JA 322. The children are thus forced to leave the school and go to the bus, highlighting that they are in need. This also disrupts their instructional time, particularly in the winter months when they must put on and remove their outer garment. JA 329-330. The MIU's cause additional problems for the Board's Title I professionals, most of whom are itinerants; in light of the limited storage space on the MIU's, they must frequently carry their records and files on a daily basis. JA 332-333.

The Board's final alternative means of supplying Title I services to the private school students is computer-assisted instruction, or "CAI." CAI provides private school students with Title I instruction via computers that are linked by modems or by dedicated telephone lines to a Board office. By 1994, 9,662 private school students were served by CAI; of those, 2,115 students received CAI services in conjunction with face-to-face services provided at either public school sites, leased sites or MIU's; this combination service was provided in response to Title I achievement tests which showed that students who receive their Title I services only by CAI do not as a group make as much educational progress as students who have the benefit of personal instruction by teachers. JA 325, 328-329.

The Board's Title I teachers are not present in the private school during CAI sessions. When students use the computers, their work product is transmitted electronically to a centralized Board office where Title I instructors monitor the students' work, report on their progress, and adjust each student's curriculum as appropriate. JA 335. The only Board employee who is present in the CAI room during Title I sessions is a CAI computer technician. JA 325-26.

Compliance with *Aguilar* has been very expensive. For the school years 1986-87 through 1993-94, the Board spent $93,245,424 for the additional costs of complying with *Aguilar*. JA 333, 344. $83,729,440 of that amount was spent in leasing MIU's. JA 336, JA 345. Under regulations promulgated by the Secretary of Education, the non-instructional administrative costs of complying with Aguilar must be taken "off the top" of the Local Educational Agency or LEA's total allocation of Title I funds. JA 335-336; A 157-158); 34 C.F.R. 200.27(c) (1996). Thus such costs of complying with *Aguilar* reduce the amount of Title I funds available for both public and private school students. Both the State of New York and Congress, in response to *Aguilar*, made funds available for such Aguilar-related capital expenses. JA 333-334. Furthermore, certain "carryover funds" were available from prior years because of the decrease of participation by private school students in New York City after *Aguilar*, JA 334, but state funds were eliminated in 1991, and the "carry-over" funds were almost exhausted at the time this motion was made. JA 335-336. For example, in 1995/96, the Board budgeted approximately 16 million dollars for such capital expenses of complying with *Aguilar* and was required to use almost 6 million dollars "off-the-top" of its Title I allocation for such expenses. JA 159.

Under the off-site program, coordination between the Board's Title I professionals and the private school staff is made more difficult. JA 331-332. They must consult with and coordinate their work with the private school staff. JA 331-332; JA 468, JA 471-473. 20 U.S.C., §§ 6315(c)(1)(C),(E), 6321(b); United States Department of Education, *Policy Guidance for Title I, Part A- Improving Basic Programs Operated by Local Educational Agencies* (April 1996), pp. 1-2. These consultations must be held off the site of the parochial school, in the MIU, or at the public school or leased site; consultation may also be by telephone. JA 331-332. For CAI, the consultation consists of the delivery of a computer-generated progress report to the private school principal. JA 332.

Compliance with *Aguilar* is a nationwide problem. In October, 1995, the Secretary of Education issued a statement in which he pointed out that hundreds of million of dollars had been spent by school districts to comply with *Aguilar*, and described *Aguilar* as having a "significant negative impact on Title I services for the neediest children in both public and private schools." A 157, A159. Secretary Riley called for reconsideration of *Aguilar* in an appropriate case. A 157, A161.

On June 7, 1995, the Board of Education passed a resolution authorizing their counsel to commence legal proceedings to seek reconsideration of *Aguilar*. In its resolution, the Board noted both the great financial costs and the educational disadvantages of the present means of delivering Title I services to private school students. JA 347-351. Thereafter, the Chancellor moved pursuant to Rule 60(b) for relief from the District Court judgment[3].

DECISIONS BELOW

Although the District Court recognized that the Board's present program of delivering Title I services to parochial school students constituted an "indisputably enormous expense," the Court denied the motion because *Aguilar* has not been explicitly overruled. A 11, 20. The Court, however, found that the Board and Chancellor had followed the proper procedure in moving under Rule 60(b), and that the motion should not be denied as untimely. A 14-20. The Court found that the use of Rule 60(b) struck the "proper balance between the conflicting principles that litigation should have finality and that justice should be done." A 16. Indeed, the Court noted that there "could scarcely be a more appropriate vehicle" for reconsideration of *Aguilar* than the same case in which the Board "is struggling with the consequences of ... [that] ... decision." A 21.

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[3] At the time of the Rule 60 (b) application, the Board was not a formal party to the action, By stipulation so ordered on May 6, 1996, the Board was added as a defendant. JA 756, JA 759.

On appeal, the Court of Appeals affirmed, substantially for the reasons stated by the District Court. A 5.

SUMMARY OF ARGUMENT

1. Rule 60(b) is an appropriate vehicle for petitioners to seek relief from the judgment which was entered upon the Court's decision in *Aguilar v. Felton*, 473 U.S. 402 (1985) and which enjoins the petitioner Chancellor and the Secretary of Education from using public funds for a Title I program to the extent it requires or permits publicly-employed teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools.

a. Rule 60(b) explicitly empowers the District Court and, on review, this Court to relieve a party from the prospective application of a judgment where such application is no longer equitable. Such relief is appropriate where there has been a significant change in facts or law. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383-384, 388 (1992); *System Federation v. Wright*, 364 U.S. 642, 643-650 (1961). There has been a significant development in the Court's Establishment Clause jurisprudence sufficient to support such relief. See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bowen v. Kendrick*, 487 U.S. 589 (1988).

b. Law of the case is a discretionary doctrine. *See Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992); *Arizona v. California*, 460 U.S. 605, 618 (1983). Discretion should be exercised in favor of reconsideration of *Aguilar* in this case, because of the significant developments in the Court's Establishment Clause jurisprudence, and because this case presents the best record for such reconsideration. Furthermore, petitioner Board of Education administers the largest Title I program in the nation, and should not be required to await reconsideration of *Aguilar* in litigation relating to another school district solely because it is subject to an outstanding injunction enforcing the holding of *Aguilar*.

2. The Court should overrule the holding in *Aguilar* that the Establishment Clause forbids the provision of Title I

special education services on the premises of sectarian schools attended by eligible students.

a. The holding in *Aguilar* that Title I special education services may not be provided on the premises of secular schools has resulted in less effective educational assistance at a substantially greater cost to the public fisc. It is inconsistent with the guiding principle of neutrality which has been most recently and relevantly expressed in *Zobrest v. Catalina Foothills Sch. Dist., supra,* 409 U.S. 1 and *Rosenberger v. Rector and Visitors of the University of Virginia,* ___ U.S. ____, 115 S.Ct. 1510 (1995).

b. This Court applied the relevant analysis in *Zobrest.* The Establishment Clause is not violated where public employees provide services on the site of a sectarian school, if they are provided pursuant to a government program which extends benefits to a broad class of citizens, defined without regard to religion. Under those circumstances, a mere indirect benefit will not invalidate the program. Under this analysis, a Title I program is not invalid because its services may be provided on the site of sectarian schools. Title I is a general program that provides benefits based upon educational and economic need, not on religion. The benefits are available whether the school attended by the eligible student is public, private or parochial. The provisions of Title I assure that the program is secular, and that any benefit to parochial schools is incidental. 20 U.S.C. §§ 6321(a)(2) and (c)(1), and 6322(b).

c. Assuming the three-pronged test of *Lemon v. Kurtzman,* 403 U.S. 602 (1971) remains valid, an on-site Title I program is legal under that test. Title I clearly has a secular purpose, and both the provisions of Title I, and the record of the Board's pre-*Aguilar* program, establish that any religious effect is incidental. As for entanglement, in light of the case-law since *Aguilar*, including *Zobrest* and *Bowen v. Kirkland, supra*, there is no excessive entanglement with religion. To hold otherwise is to violate the principle of neutrality toward religion and subvert the worthy goals of the Title I program.

ARGUMENT

POINT I

THE PETITIONERS PROPERLY INVOKED THE JURISDICTION OF THE DISTRICT COURT PURSUANT TO RULE 60(b). THE QUESTION OF THE CONTINUING VALIDITY OF *AGUILAR v. FELTON*, 473 U.S. 402 (1985) SHOULD BE CONSIDERED BY THE COURT.

In its order granting the petitions in this case, the Court directed the petitioners to brief and argue, in addition to the questions raised in the petitions, this question: "Whether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief petitioner seeks." Petitioners submit that Rule 60(b) is a proper vehicle for modification of the outstanding injunction, and that law of the case does not bar the Court from granting petitioners such relief.

Rule 60(b) provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment...."

Rule 60(b), and particularly its reference in subdivision 5 to the relief from a judgment with prospective application, is grounded in the familiar and long-standing equity principle that injunctive relief can be modified or vacated "when its continuance is no longer warranted." *Drivers Union v. Meadowmoor Co.*, 312 U.S. 287, 298 (1941). As stated by Justice Brennan, "[I]t was the law long before the promulgation of Rule 60(b) that a change in the law after the rendition of a

decree was grounds for modification or dissolution of that decree as it might affect future conduct." *Polites v. United States*, 364 U.S. 426, 438 (1960) (dissent). This Court has recognized that where the circumstances supporting an injunction have changed, such as where the enjoined practice is no longer violative of a statute, the injunction may be modified. *System Federation v. Wright*, 364 U.S. 642, 643-50 (1961), quoting *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 430-432 (1855). Thus the Court has held that Rule 60(b) authorizes modification of a consent decree where there has been a significant change in circumstances, either of facts or law. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383-84 (1992).

Had this Court explicitly overruled *Aguilar* in some other case, we believe it clear that a Rule 60(b) motion would be the appropriate vehicle for the Chancellor and the Board (and presumably the Secretary of Education) to seek relief from the District Court injunction. *See System Federation v. Wright*, *supra*, 364 U.S. at 648. *Accord*, *Rufo*, *supra*, at 388 (consent decree may be modified where statutory or decisional law has made legal what decree was designed to prevent). It is submitted that denial of such an application would be an abuse of discretion, particularly in light of the factual record established by petitioners. Thus our application, whether or not *Aguilar* had yet been overruled, cannot be denied on Res Judicata principles of finality. The District Court, and this Court on review, had the clear power to entertain our application. *System Federatation* at 646. Furthermore, the circumstance that the case was previously reviewed by this Court does not bar Rule 60(b) relief. *Standard Oil Co. of California v. United States*, 429 U.S. 17 (1976) (Motion to recall Supreme Court mandate denied because District Court may decide Rule 60(b) motion without leave of Supreme Court).

Thus the constraint on this Court, other than stare decisis, is the law of the case doctrine. *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992), *Arizona v. California*, 460 U.S. 605, 618-619 (1983). While the cited cases are original jurisdiction cases where this Court has refused to "extrapolate wholesale

[the] law of the case [doctrine]," *Arizona v. California*, *supra* at p. 619, even in that situation the Court will overrule its prior ruling on a showing of changed circumstances of fact or law. *Wyoming v. Oklahoma*, *supra*, at 446.

Law of the case is a doctrine grounded in discretion, and does not limit the Court's power to reconsider an issue. *Wyoming v. Oklahoma*, *supra* at 446 ("Of course, we surely have the power to accede to Oklahoma's request at this late date....") There are numerous factors which counsel in favor of reconsidering *Aguilar* in this case. First, there have been significant developments in the law supporting that relief. *See*, *e.g. Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)(Government-funded sign-language interpreter may provide his services on the premises of a sectarian school); *see also Bowen* v. *Kendrick*, 487 U.S, 589, 615-617 (1988) (discussing entanglement). Indeed, the state of the law in the Second Circuit has so changed that it is now legal for a publicly-employed teacher to enter the premises of a parochial school to provide special education services for disabled students, *Russman v. Watervliet School District*, 85 F3d 1050 (2d Cir., 1996), *pet. for cert. pending*, docket 96-776, but it is illegal under *Aguilar* to send a publicly-employed teacher onto such premises to provide remedial services.

There are other reasons, both legal and practical, why discretion should be exercised to reconsider *Aguilar* in this posture. Five members of this Court have called for reconsideration of that decision, *see infra*, p. 24, and this case is a paradigm of a Title I program as it is and might be applied in private schools. The petitioners' school district is the largest in the nation with the largest Title I program, and within the City of New York is a substantial parochial school system with large numbers of children eligible for Title I services. JA 310, JA 659, JA 673. The record of the Board's past and present manner of delivering Title I services to parochial school students would provide the best backdrop for reconsideration of *Aguilar*. To deny review of the merits here would require the petitioners, and the Secretary of Education, to remain under the constraint of an injunction the legal basis

of which members of this Court have called into question, both by the various opinions in *Board of Educ. of Kiryas Joel* v. *Grumet*, -U.S.-, 114 S.Ct. 2481 (1994) and the grant of the petitions in this case. While the Court awaits another vehicle for reconsideration of *Aguilar*, one with a necessarily less extensive record comparing pre- and post- *Aguilar* programs, millions of dollars will be spent to comply with *Aguilar*. As the Secretary has pointed out, there could be significant delay and additional expense resulting from such litigation. There is also the complication that the Secretary, while continuing to enforce the decision in *Aguilar*, believes it to be unsound, and would not be an aggressive participant in such lower court proceedings. Brief for the Secretary of Education on Petitions for Writ of Certiorari, pp. 14-15, and n. 8.

A refusal to review the merits here would lead to the unfortunate result that the school district with the largest Title I program in the nation, and with a substantial private school component of that program, would be the only school district in this nation without an available remedy to seek reconsideration of *Aguilar*. The Court should exercise its discretion to reconsider the continuing validity of *Aguilar* in this case.

POINT II

AGUILAR v. FELTON, 473 U.S. 403 (1985) IS INCONSISTENT WITH THE ESTABLISHMENT CLAUSE JURISPRUDENCE OF THE COURT, AS STATED MOST RECENTLY IN *ZOBREST v. CATALINA FOOTHILLS SCHOOL DISTRICT*, 509 U.S. 1 (1993) AND *ROSENBERGER v. RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA*, __ U.S. __, 115 S. Ct. 2510 (1995). THE PETITIONERS' RULE 60(b) MOTION SHOULD BE GRANTED.

(1)

In *Aguilar*, this Court, by a 5-4 majority, struck down a program described by then Chief Justice Burger as one that

"has done so much good and little, if any, detectable harm." 473 U.S. at 420, quoting *Felton v. Secretary, United States Department of Education, supra*, 739 F.2d at 72 (2d Cir., 1984). Indeed, as Justice O'Connor stated, in the 19 years of the Board's on-site program, there had never been an incident in which a Title I instructor had even subtly attempted to indoctrinate a student in any religious tenet. 473 U.S. at 424. It was also clear at that time that the alternative methods of providing the Title I services would be more expensive and less effective than the on-site program. *Ibid.*

In *Board of Education of Kiryas Joel v. Grumet, supra*, 114 S.Ct. 2481, a case in which the Court struck down a special school district created in response to *Aguilar*, five members of the Court explicitly stated their wish to reconsider *Aguilar*. *Ibid.*, p. 2498 (O'Connor, concurring; "It is the Court's insistence on disfavoring religion in *Aguilar* that led New York to favor it here"); *Ibid.*, p. 2505 (Kennedy, concurring; "One misjudgment [in deciding *Aguilar*] is no excuse, however, for compounding it with another"); *Ibid.*, p. 2515 (Scalia dissenting, joined by Rehnquist and Thomas; "[*Aguilar* and *Grand Rapids*] should be overruled at the earliest possible moment.").

As petitioners have shown in their Rule 60(b) application, the mischief caused by *Aguilar* is not limited to the factual situation in *Kiryas Joel*. Compliance with *Aguilar* has forced petitioners to use alternatives which are less educationally effective than the on-site program, and at substantially increased costs. Hundreds of millions of dollars have been spent nationally to comply with *Aguilar*, and such sums could have been spent for worthier purposes, including the education of the nation's neediest children in both public and private schools.

This Court should now overrule *Aguilar* and restore the Court's Establishment Clause jurisprudence "to the proper track - government impartiality, not animosity toward religion." *Ibid.*, p. 2498 (O'Connor, concurring).

(2)

The Court's present Establishment Clause Jurisprudence is most aptly and relevantly set out in *Zobrest v. Catalina Foothills School District*, *supra*, 509 U.S. 1. In *Zobrest*, the Court held that the Establishment Clause was not violated by providing a publicly-employed sign-language interpreter to a deaf student attending a secular high school. Not only would the state-employed interpreter be in the religious school throughout the regular school day, but he or she would be required to communicate verbatim the material covered in religion class, daily Mass, and the "nominally secular subjects that are taught from a religious perspective." 509 U.S. at 19 (Blackmun, J., dissenting).

In speaking for the Court, Chief Justice Rehnquist stated the policy underlying the Court's analysis:

> We have never said that "religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). For if the Establishment Clause did bar religious groups from receiving general government benefits, then "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Widmar v. Vincent*, 454 U.S. 263, 274-275 (1981)(internal quotation marks omitted). Given that a contrary rule would lead to such absurd results, we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

509 U.S. at 8.

The Chief Justice then analyzed the constitutionality of the services provided to the student in *Zobrest*:

> The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "disabled" under the IDEA, without regard to the "sectarian-nonsectarian, or public-private nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking. Viewed against the backdrop of *Mueller* and *Witters*, then, the Court of Appeals erred in its decision. When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," *Witters*, *supra*, at 488, it follows under our prior decisions that provision of that service does not offend the Establishment Clause. See *Wolman v. Walter*, 433 U.S. 229 (1977).

509 U.S. at 10

Thus under *Zobrest* the Establishment Clause is not violated where public employees provide services on the site of sectarian schools, if they are provided pursuant to a government program which neutrally extends benefits to a broad class of citizens, defined without regard to religion; a mere indirect or attenuated benefit to sectarian schools will not invalidate the program. *Zobrest*, *supra*, p. 10.

This approach of neutrality towards religion has been a dominant theme of this Court's Establishment Clause jurisprudence. In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court rejected an Establishment Clause challenge to a state's provision of vocational rehabilitation assistance to a student attending a private Christian college and studying, *inter alia*, the Bible and

church administration in order to become a pastor, missionary or youth director. 474 U.S. at 483. In applying the *Lemon* test, the Court found there was no direct subsidy to the religious college. The rehabilitation benefits were part of a general program made available without regard to the nature of the institution attended; the aid went to the student, who made the choice to attend religious education. 474 U.S. at 487-489.

Neutrality toward religion was the central theme in *Mueller v. Allen*, 463 U.S. 388 (1983), where the Court upheld a Minnesota statute providing a limited tax deduction for tuition, textbooks, transportation and related expenses for taxpayers' dependents attending elementary and secondary schools. 468 U.S. at 391-392. Although these benefits were available to taxpayers whose dependents attended sectarian schools, the program was upheld. The Court found that the deduction was available to all parents, not simply those whose children attend sectarian schools, and any benefit flowing to sectarian schools was solely the result of the taxpayer's choice. *Id.*, pp. 395-399.

This neutrality principle has been a touchstone of the Court's Establishment Clause caselaw. *See e.g., Everson v. Board of Education.* 330 U.S. 1 (1947)(New Jersey statute authorizing local boards to reimburse parents of students attending all non-profit schools for fares for public transportation found constitutional; noting the friction between the Establishment and Free Exercise Clauses, the Court found the statute consistent with the First Amendment's policy of neutrality toward religious believers and non-believers); *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968)(New York statute authorized local school authorities to lend non-religious textbooks to all students at certain grade levels, including students attending private schools; Court noted that the program provided to "all children the benefits of a general program to lend books free of charge"; *Board of Education v. Mergens*, 496 U.S. 226, 248 (1990)(Court upheld the Equal Access Act guaranteeing student religious groups equal access to secondary school facilities; Justice O'Connor, writing for plurality,

noted that discrimination against religious groups would show hostility rather that neutrality toward religion).

The neutrality principle has most recently been applied in *Rosenberger v. Rector and Visitors of the University of Virginia*, __ U.S. __, 115 S.Ct. 2510 (1995) wherein the Court held the university violated the free speech rights of the petitioner students when it refused to pay the printing costs of their student journal solely because it "promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." 115 S.Ct. at 2513. The Court found this to be impermissible viewpoint discrimination, relying, *inter alia*, on the holding of *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (Viewpoint discrimination to deny a request to use school facilities to show a film series on child-rearing questions when only reason for denial was that it expressed a Christian viewpoint). The Court addressed the analysis utilized by the Court of Appeals - that while refusing to pay the journal's printing costs violated the Free Speech Clause, such refusal was necessary to avoid violating the Establishment Clause through a monetary subsidy to a religious organization. 115 S.Ct. at 2521. In finding no Establishment Clause violation, Justice Kennedy, writing for the Court, stated:

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion . . . . We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.

Id. at 2521 (citations omitted).

The Court then turned to a discussion of the university's program, and continued its emphasis on neutrality.

> The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the [Student Activities Fund] is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. . . . The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was.

Id., at 2522.

The Court also found the principle of neutrality forwarded by the university's explicit disassociation from the views of the various student societies and publications which received funding. *Id.*, p. 2523. The Court found the payment of printing costs indistinguishable from the provision of school facilities, and relied on its holding in *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) that a public university may constitutionally grant access to its facilities on a religiously-neutral basis to a wide spectrum of student-groups, including groups which use meeting rooms for sectarian activities, including some devotional exercises. *Id.*, p. 2523. The Court further found that any benefit to religion is solely "incidental to the government's provision of secular services for secular purposes on a religious-neutral basis." *Id.*, p. 252. Accordingly, the Court found that the Free Speech Clause mandated, and the Establishment Clause did not preclude, the reimbursement of the magazine-printing costs.

Guided by the principle of neutrality, and specifically applying the analysis in *Zobrest*, it is submitted that the holding in *Aguilar* was wrong and that the Board's on-site Title I program fully comported with constitutional requirements. Title

I, like the IDEA in *Zobrest*, is a general government program that distributes benefits neutrally to any child without regard to the nature of the school he or she attends; a child's eligibility is determined by educational and economic disadvantage, not by religion or the religious nature of the school attended. 20 U.S.C., §§ 6313, 6315(b). Title I mandates that eligible students attending private schools, parochial or otherwise, receive services that are "equitable" in relation to that given to public school students. 20 U.S.C. § 6321(a)(3); 34 C.F.R. 200.10-11 (1996). As the Title I benefits are available whether the student attends public, private, or parochial school, the Board of Education employee is present on the site of the parochial school as a result of the private decision made by the parents to send the child there. 509 U.S. at 10. Thus there is no financial incentive for the parent to choose the sectarian school. *Id.*

As in *Zobrest*, any economic benefit to the parochial school is, at most, indirect and highly speculative. *Id.*, pp. 10-11. Title I assures that there is no direct benefit to the parochial school; all services and material provided with Title I funds must be secular, neutral and nonideological, and the control of all funds and title to all equipment must be in a public agency. 20 U.S.C. § 6321(a)(2) and (c)(1). Title I funds must be used to supplement, not supplant, the private school student's classroom work, and the Secretary's regulations specifically mandate that Title I funds not be used for the needs of the private school or the general needs of children in a private school. 20 U.S.C. § 6322(b); 34 C.F.R. 200.12(b) (1996). Under the circumstances, any benefit to a parochial school is "incidental," *see*, *Widmar v. Vincent*, *supra*, 454 U.S. at 273-274 and "attenuated." *Witters v. Wash. Dept. of Services for Blind*, *supra*, 474 U.S. at 488. As in *Zobrest*, the Board's on-site program results in no direct subsidy to the sectarian schools, as was found in *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Grand Rapids School District v. Ball*, *supra*, 473 U.S. 373. The aid is given to the individual child in need of special education assistance, not the parochial school he or she happens to attend. 509 U.S. at 13-14.

(3)

Recent Establishment Clause cases have been marked by the Court's failure to apply the *Lemon* test. *See e.g.*, *Zohrest v. Catalina Foothills School District*, *supra*, 409 U.S.1; *Rosenberger v. Rector & Visitors of Univ. of Va.*, *supra*, 115 S. Ct. 2510; *see also Board of Educ. of Kiryas Joel v. Grumet*, *supra*, 114 S. Ct. 2481. However, the *Lemon* test has not yet been explicitly overruled by the Court. *See*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, *supra*, 508 U.S. at 395, n.7. Assuming the *Lemon* test retains any viability, it cannot be applied, consistently with the Court's more recent Establishment Clause jurisprudence, to invalidate an on-site Title I program like the Board's pre-*Aguilar* program.

There is no serious doubt that the Congress' purpose of assisting economically and educationally deprived children is a proper secular purpose. *See Wheeler v. Barrera*, 417 U.S. 402, 405-06 (1974), *mod.*, 422 U.S. 1004 (1975). Likewise, as we show in subpoint 2, any religious effect is merely incidental, not primary. *Zobrest*, *supra*, at 12. This is confirmed by the Board's almost 20 year history of maintaining the secular nature of its on-site program.

The final prong, whether the government is excessively entangled with religion, was the sole basis for the finding of unconstitutionality in *Aguilar*, 473 U.S. at 409-414. However, since *Aguilar*, this Court's Establishment Clause jurisprudence has substantially changed, including its entanglement analysis. *Zobrest*, *supra*; *Bowen v. Kendrick*, *supra*, 487 U.S. 589.[4] To invalidate a religiously-neutral program such as an

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[4] In *Bowen*, this Court rejected an Establishment Clause attack on the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300Z, *et seq*. In considering the facial attack on the statute, the Court applied the *Lemon* test. The Court found a secular purpose (487 U.S. at 602-609), and that any religious effect was merely incidental, even though Congress determined that religiously-affiliated organizations would be among those organizations providing services and therefore receiving federal grants under the legislation. *Id.*, pp. 605-609.

(Footnote continued)

on-site Title I program on the grounds of entanglement is at odds with this Court's guiding principle of neutrality toward religion. This is particularly true where, as in *Aguilar*, a primary source of the "entanglement" arises from the supervision by one group of public employees (Title I supervisors) of the work of other public employees (Title I teachers). 473 U.S. at 413. Under *Aguilar*, a religiously-neutral government program must be invalidated solely because of good-faith efforts by public officials to assure such neutrality. This "Catch-22" reasoning is no longer valid. *Bowen v. Kendrick*, *supra*. To hold otherwise would subvert the laudable goals of Title I. *Aguilar v. Felton*, *supra*, 473 U.S. at 420-21 (Rehnquist, dissenting).

The Court's finding as to entanglement is particularly relevant. The Court found no entanglement although it recognized that federal employees might visit the clinics and offices where the services were being carried out by, among others, religiously-affiliated organizations, to assure compliance with statutory and constitutional guidelines. *Id.*, pp. 615-617. The Court described the argument that such monitoring constitutes an entanglement as a "Catch-22" argument. *Id.*, p. 615.

CONCLUSION

THE ORDER OF THE COURT OF APPEALS SHOULD BE REVERSED SO AS TO GRANT THE PETITIONERS' RULE 60(B) MOTION AND VACATE THE INJUNCTION.

Respectfully submitted,

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